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Lawrence H. Norton, General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: MUR 5517 - Opposing Brief of Respondents, James R. Stork; Jim Stork for Congress and William C. Oldaker, in his official capacity as treasurer; Stork Investments, Inc. d/b/a "Stork's Bakery" and Stork's Las Olas, Inc.

Dear Mr. Norton:

This law firm and the undersigned attorneys represent the above respondents in the subject MUR. This letter constitutes the respondents' brief in opposition to the General Counsel's brief sent to us by letter dated November 2, 2006, which recommends that the Federal Election Commission find probable cause to believe that the respondents have violated the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. 431 *et seq.* (2005), and Commission regulations.

In summary, respondents oppose the General Counsel's recommendation to find probable cause in MUR 5517. Part II of the General Counsel's Brief pertains to cable television and direct mail marketing advertisements soliciting customers for Mr. Stork's bakery businesses, which were paid for by those corporate entities and distributed within 90 days before August 31, 2004, the date scheduled for Florida's primary election in the 22nd Congressional District. Part III of the Brief pertains to the disclosure of in-kind contributions and advances made by Mr. Stork to, or on behalf of, his Congressional campaign committee for which he received partial reimbursement after he withdrew from the general election campaign in September 2004.

This reply brief letter responds to both parts of the General Counsel's Brief in the order presented. We contend that the General Counsel's position set forth in Part II is not supported as a matter of law by Commission regulations or FECA, and that the position

set forth in Part III is, in large part, supported by Commission regulations but is not appropriate for a probable cause determination at this time.

A. The General Counsel's Brief does not establish a violation of 2 U.S.C. 441b because the bakery café ads were solely for business purposes, had no content with any express or implied campaign message, and appeared within 90 days of an unopposed primary election in which no viewer/reader had any opportunity to vote either for or against Mr. Stork.

The Brief Part II-A correctly summarizes most of the relevant facts as to the content of the cable television and direct mail advertising programs carried out by the Stork bakery cafes in the periods June 29 through July 18, 2004 (television ads) and June 21 through late July 2004 (direct mail marketing). This schedule was set to coincide with the opening on June 21 of a new Stork café in Fort Lauderdale. The voice and video image of Mr. Stork (shown holding a bakery product) appeared for about five seconds in a bakery ad of 15 seconds; the other 10 seconds of the ad depicted the café interior, showing patrons and several bakery and café products. Similarly, Mr. Stork's photo was used within the direct mail marketing materials, but other content in each mail piece represented 93.6% of the total space. For a more extensive explanation of the content of the bakery café marketing materials, see respondent's six-page letter, dated October 6, 2005, which was addressed to the Chairman of the Commission, with copies to each of the other five Commissioners in office at that time. Copy enclosed herewith.

The Brief fails, however, to describe or explain highly relevant and material facts about the Florida 22nd Congressional District primary election that was scheduled for August 31, 2004. See pages 3 and 4 in the October 2005 letter, cited above. In short, this scheduled primary election was not held for the office of U.S. Representative in the Congress. No names were on the ballot for the office. No person going to the polls on August 31, 2004, in the FL 22nd CD could vote for any Congressional candidate; no such votes were counted or reported. *Federal Elections 2004:* "Election Results for the...U.S. House of Representatives," Federal Election Commission, May 2005, p. 97. Both Mr. Stork (D) and Congressman Clay Shaw (R) were unopposed for the nominations of their respective political parties. No persons in the FL 22nd CD could have been influenced as to any voting behavior or decisions on August 31, 2004, by any message they might have received within 90 days before August 31 because no act of voting could occur in that non-election for party nomination to the office of U.S. Representative. Furthermore, no potential voter could have been influenced by these bakery ads to support another person who might have considered opposing Mr. Stork for the Democratic Party's nomination before the May 7, 2004, ballot-filing deadline since the earliest bakery ad did not run until June 21, 2004. (Mr. Stork was the only person to file and qualify for the office by May 7.)

Respondents concede that the unopposed August 31 primary election in the FL 22nd CD was an "election" for some purposes under FECA and Commission regulations. For example, an unopposed primary election is still an "election" with a separate

contribution limit for the unopposed candidate, and the campaign committee of an unopposed candidate must file a pre-primary election disclosure report. Respondents further concede that the subject August 31 primary election is an "election" that triggers the 90-day window for campaign-related communications.

The General Counsel's Brief, however, includes virtually no legal analysis of the critical regulation provision that underlies Counsel's contention that the Stork bakery marketing materials were coordinated communications under Commission rules. Namely, the requirement that a covered communication must be "directed to voters" within 90 days before an election in which the referenced candidate is on the ballot, so that voters can vote for or against such candidate.

In general, the regulation governs payments for "coordinated communications" which are considered to be contributions to a candidate or campaign committee. 11 CFR 109.21(b)(1). One subsection of the regulation purports to provide a bright-line test for determining whether any payment for a public communication that mentions or identifies a person who is a federal candidate is, by operation of law, for the purpose of influencing the candidate's election. 11 CFR 109.21(c)(4). This is the so-called "content prong" of the three-prong test set forth in the regulation, and is the only prong at issue in this matter.

The "content prong" itself has four elements or standards to determine whether a given communication has the requisite content that could cause it to be regulated as a contribution for the purpose of influencing a federal election. Any one of these four elements, if present, will cause the communication to be considered as having met the "content prong."

As the Brief recognizes, the communication facts summarized above fall outside three of the four standards set forth in the "content prong." Namely, they were not an "electioneering communication." Nor were they the republication of candidate campaign materials. Nor did they include messages that expressly advocate the election or defeat of a clearly identified candidate. Accordingly, this case turns on the fourth standard of the "content prong." 11 CFR 109.21(c)(4).

B. Respondents contend that the mandatory "directed to voters" component of the "content prong" is not satisfied in this matter because there was no voting opportunity at the close of the 90 day period on August 31, 2004, the date of Florida primary election held only for non-Congressional offices.

The fourth standard of the "content prong" requires the making of a public communication that refers to a clearly identified candidate, that is distributed within 120 days (recently revised to 90 days) of an election, and that "is directed to voters in the jurisdiction of the clearly identified candidate..." 11 CFR 109.21(c)(4)(iii) [2004].

The described bakery café marketing advertisements were not directed to voters in the 22nd Congressional District of Florida in any respect. Instead, they were directed to cable television customers and to addressees within the business market area of the Stork bakery businesses, and the totality of the ad contents make clear that the purpose was to solicit the viewers' and readers' patronage of the Stork bakeries. Not to influence any imminent election activity, such as voting. Indeed, there were no voters to whom the ads could be directed within the described 90 day window because the closing date for that window (August 31, 2004) was not an election event in which a person who received the bakery ad (or anyone else for that matter) could engage in any election action. The absence of any ballot line or candidate names for the office in question meant that there was no opportunity for any voter to vote.

It is also significant that the "directed to voters" language of the regulation is within a temporal context (90 days before an election), and it is only in that context that a communication is covered, or not covered. Any possible name recognition value that Mr. Stork might have received as a result of the bakery ads in support of his campaign for nomination by the FL Democratic Party is moot and immaterial; he had the Party's nomination by May 8, 2004 since no other candidate filed in opposition to Mr. Stork.

Any possible name recognition value that Mr. Stork might have received as a result of the bakery ads in support of his general election campaign is highly speculative and in any case is not relevant. In the facts presented here, the only focus permitted by the regulation is within the 90-day window before August 31, 2004, the date of a scheduled election but in which there were no voters for the office sought by Mr. Stork. Moreover, the regulation sets a separate time frame for public communications within 90 days of the November 2004 election. (The Brief, footnote 1, indicates that the General Counsel does not recommend probable cause with reference to any distribution of these ads during the general election campaign because the 2006 revised regulations reduce the time frame to 90 days, and none of the ads ran within 90 days before the November 2004 general election.)

C. Respondents position that the bakery ads were not "directed to voters" is grounded in the Commission's regulation history, which represents a compelling declaration by the Commission as to the intended application and meaning of its own regulations.

Respondents' contention that the described bakery ads were not "directed to voters" is clearly made manifest from the Commission's Explanation and Justification ("E & J") for its original promulgation of the "content prong" regulation in 2003. In pertinent part, the E & J provides:

> The 'directed to voters' requirement focuses on the intended audience of the communication, rather than...the expected geographic limits of a particular media, that will be determined on a case-by-case basis from the

content of the communication, its actual placement, and other objective indicators of the intended audience. 68 *Fed. Reg.* 431 (January 3, 2003).

Furthermore, in revising the "content prong" of its regulations in 2006, which deletes the "directed to voters" clause, the Commission's E & J also affirms respondents' position regarding the interpretation and intent of the 2003 version of the regulation. In part, the 2006 E & J provides:

> The 2002 rules provided that to satisfy the fourth content standard, a public communication must be directed to voters in the jurisdiction **where the clearly identified Federal candidate is on the ballot**....These [2006] revisions clarify that a communication is potentially for the purpose of influencing a Federal election where the persons receiving the communication that is coordinated **can vote for or against the referenced candidate or candidate's opponent in that election**.... 71 *Fed. Reg.* 33200 (June 8, 2006). [emphasis added]

As indicated above, the Commission's stated intention in the 2003 regulations was to apply the "directed to voters" requirement on a case-by-case basis, and with reference to the content of the communication, its placement and other objective indicators of the intended audience. We have explained that the bakery café marketing advertisements in both television and print formats were distributed within 90 days of the scheduled Florida primary election to an audience comprised of cable subscribers and USPS mail addressees as determined objectively by the cable television carriers and the direct mail vendor. The choice of those public media distributors was entirely a business decision made exclusively to enhance the marketing potential of the Stork bakery cafes and solicit consumers to patronize one or more of those business entities.

The content of the marketing campaign materials affirms this exclusive business purpose. The content does not convey any campaign-related message; nor does it convey any election-influencing message to "voters" in the unopposed 22nd CD, Florida primary election. There were no voters in that election. The Commission's E & J for its 2006 revisions clearly explains that a covered communication only has election influencing potential when the persons receiving it can vote for or against a candidate (or an opponent) who is on the ballot in the upcoming election for which the 90 day window is open.

D. Respondents relied upon the explicit language of Commission regulations (coordinated communication must be "directed to voters") and acted in good faith when they pursued a business advertising campaign, identifying Mr. Stork, that was directed to cable television customers and USPS mail addresses during a period that happened to fall within 90 days of an unopposed Congressional primary election wherein no voters could support or oppose Mr. Stork or any other candidate. Thus, respondents' action in good faith reliance should not be subject to any Commission sanction. 2 U.S.C. 438(e).

Even if the Commission rejects the arguments made above with respect to respondents' interpretation of the relevant regulations and their underlying intent as stated in the E & J, it should nonetheless recognize that respondents' interpretation is reasonable, and most certainly not unreasonable.

On its face, the phrase "directed to voters" within the content prong of the coordinated communications rule should have meaning to a reasonably intelligent and rational reader (English-proficient) that comports with the words used: distribution of the purported campaign-related message must be directed to persons who could potentially be voters and then actually vote in the upcoming election scheduled to occur at the close of the 90-day window (120 days during the 2004 election cycle). The August 31 unopposed primary election presented no such voter or voting opportunity in the 22nd CD of Florida.

Respondents had to make business decisions during the same period in which Mr. Stork was a Congressional candidate, and as the primary officer in his business ventures Mr. Stork himself had to perform his business duties at the same time he was also a candidate. Key actions by Mr. Stork, as well as by his agents and advisors in both his business and Congressional campaign, had to be made quickly and often with very little, if any, time for research and seeking advice from legal counsel. In such an environment, Mr. Stork and his campaign advisors had to rely, often instantly, on the language of Commission regulations, and they did so in good faith with respect to this matter.

In addition, in this case the Commission should recognize the Respondents' good faith reliance on the cited regulation language because the regulation was in effect for the first time in the 2004 election cycle, and there was virtually no relevant interpretative guidance available through issued advisory opinions or enforcement cases on the public record. Moreover, the regulation itself was under challenge in litigation and on September 18, 2004, within about 30 days after the complaint was filed in this matter, the U.S. District Court for the District of Columbia ruled that the coordinated communication regulations, along with several others, were contrary to law and thus invalid. *Shays v. FEC*, 337 F.Supp.2d 28 (D.D.C. Sept 18, 2004).

In short, the meaning of the regulatory language had not been clarified or amplified by the Commission during the period when the conduct presented in this matter transpired, and judicial invalidation of the rule occurred shortly thereafter. Given the unsettled and confusing status of the coordinated communication rules in the 2004 election cycle and for the other reasons explained above, the Commission should determine that respondents relied upon the cited regulation language in good faith, and are accordingly entitled to protection from any civil penalty sanction in this matter pursuant to 2 U.S.C. 438(e). (Person who relies on a Commission regulation, and acts in good faith in accordance with the regulation, is protected from FECA's sanctions for such good faith action.)

E. Respondents concede that some in-kind contributions made from the personal funds or assets of Mr. Stork in his 2004 Congressional campaign were only

partially reported, and in some cases were not reported accurately or in a timely manner. The Stork campaign committee did properly report over 50% of the in-kind contributions made by Mr. Stork.

Respondents agree with Part III of the Brief in many respects. However, one of the reporting issues discussed therein relates to the alleged corporate contributions treated in Part II. Respondents obviously do not concede that the disclosure requirements of FECA apply to payments made for the bakery café advertisements.

In general, respondents assert and the record in this case affirms, that approximately $23,000 of in-kind contributions or advances were made by Mr. Stork from his personal funds or other assets (including his personal credit card) to his campaign. Significantly, these in-kind contributions were made to a campaign that reported approximately $964,000 in total net contributions for the 2004 election cycle (through September 30, 2004).

Approximately $12,614 of the $23,000 of the Stork in-kind contributions was properly and timely disclosed on reports filed by the campaign with the Commission. The remaining amount of approximately $10,386 represents slightly over 1% of total contributions. The amount consisted of several, separate in-kind contribution transactions and advances of personal funds to cover campaign expenses that were reflected to a limited extent on reports filed with the Commission.

Respondents concede that the reporting of several of these individual transactions was not timely and in other respects did not fully comply with Commission regulations; in particular, those governing the disclosure of candidate advance payments on Schedule A, and also as debts on Schedule D in those instances where the purpose of the advance payment was to cover campaign travel expenses that were not reimbursed within 60 days after the closing date of a credit card billing statement wherein the expense posted to the account.

Almost all of the misreported transactions relate to travel and subsistence expenses that Mr. Stork incurred during June 10—28, 2004, when he made several fundraising trips to locations distant from Florida. The record in this matter (Stork sworn declaration) shows that Mr. Stork intended to receive reimbursement from his campaign for these expenses, which he initially paid from his personal funds, although the reimbursement (in a single lump sum) was not made to him by the campaign until September 28, 2004. That date was more than 60 days after the July 12 credit card billing statement that included the last transaction on June 28. Other advanced travel expenses falling within this period for which he received reimbursement in the September 28 payment were obviously outside the 60-day window for credit card use.

As respondents' counsel has previously indicated and recently reiterated to the Office of General Counsel, we are available to pursue negotiations as to an appropriate civil penalty for these minor disclosure infractions, as well as the filing of any amendments to past FEC reports that may be necessary at this time.

For the reasons discussed above, counsel for the respondents respectfully request that the Commission make a determination at this time that there is no probable cause to believe that any violations of FECA or Commission regulations occurred with respect to the bakery and café advertisements described in this matter. Furthermore, respondents request that the Commission temporarily defer any probable cause finding as to the disclosure issues discussed in section E above.

Very truly yours,

OLDAKER, BIDEN & BELAIR, LLP

By: _____
William C. Oldaker

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N. Bradley Litchfield